FOR ARGUMENT

Supreme Court, U.S.
FILED
SEP 10 1996

(8)

No. 95-1228

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

JERRY E. WELLS AND KENNETH R. STEELE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Section 1014 of Title 18 is violated when a person "knowingly makes any false statement or report * * * for the purpose of influencing in any way the action," *inter alia*, of a federally insured bank. This Court granted certiorari on the question whether the materiality of the false statement or report is an element of the offense described by Section 1014. In our opening brief, we argued that, in light of the statute's text and history, materiality is not an element of that offense. While respondents take issue with that argument (Resp. Br. 20-36), they (Resp. Br. 11-20, 37-39) and their amici (NACDL Br. 4-13) principally seek affirmance on the ground that factors particular to the indictment, trial, or appeal in this case require

reversal of their convictions. Respondents' arguments lack merit.

1. On the question whether materiality is an element of Section 1014, respondents' argument proceeds entirely from the premise (Resp. Br. 25, 27, 30) that the text and history of Section 1014 are "ambiguous" on that question. Respondents argue that the Court should resolve that ambiguity by imputing a materiality element to the statute, based on the fact that materiality was an element of the offense of perjury at common law (Resp. Br. 23-24), the policy interest in "ensuring that reasonable limits are imposed on broad criminal statutes" (Resp. Br. 36), and the rule of lenity (Resp. Br. 30-31).

The text of Section 1014, however, is not ambiguous, and there is thus no warrant for consulting such nontextual sources. Rather, the statute simply does not include a textual materiality element. It is not relevant that materiality was an element of the offense of perjury at common law (Resp. Br. 23). Federal offenses are creatures of statute, and the modern-day United States Code makes materiality an element of some false-statement offenses (and of perjury, see 18 U.S.C. 1621) but not of others (including Section 1014). As this Court has often held, Congress's textual definition of the elements of a criminal offense ordinarily is decisive. See *Staples* v. *United States*, 114 S. Ct. 1793, 1796 (1994); *McMillan* v. *Pennsylvania*, 477 U.S. 79, 85 (1986); U.S. Br. 12.

There is no basis for respondents' supposition that, in enacting Section 1014, Congress either inadvertently neglected to address the question of materiality (Resp. Br. 27) or omitted a materiality element as a result of a "drafting error" (Resp. Br. 31), justifying imputation of that element. There is no evidence that

Congress ever intended to make materiality an element of Section 1014. On the contrary, Congress has included a materiality element in particular false statement statutes, while conspicuously omitting that element from Section 1014. See U.S. Br. 13-15. In light of the "textual variations" among those closely related statutes on the issue of materiality, the absence of a materiality element from the text of Section 1014 "speaks volumes" about Congress's intention to omit a materiality element from that statute. *United States* v. *Shabani*, 115 S. Ct. 382, 385 (1994).

Additional evidence that Congress intentionally omitted a materiality element from Section 1014, and did not act inadvertently, is found in Section 1014's history. Of the 13 false-statement statutes that in 1948 were consolidated in Section 1014, ten did not include a textual materiality element, while three others did. See U.S. Br. 15-19. Ten years before the enactment of Section 1014, this Court had held, in a case involving one of the ten predecessor statutes to Section 1014 that did not contain a textual materiality element, that the government could establish a violation of that statute even where the false statements in question "were not influential *or the information not important.*" See *Kay* v. *United States*, 303 U.S. 1, 5-6 (1938) (emphasis added); U.S. Br. 17-18.[1] Particularly in light of *Kay*, Congress's decision to pattern Section 1014 on the ten statutes that did not contain a

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[1] Contrary to respondents' claim that *Kay* only "addressed the issue of not having to prove actual reliance by the bank," Resp. Br. 33, *Kay* expressly rejected any need to show that the false statements were "important"—*i.e.*, material—to the bank. 303 U.S. at 6.

textual materiality requirement, rather than the three statutes that did, is consistent only with the conclusion that materiality would not be an element of the new statute.

Respondents note (Resp. Br. 29) that several courts of appeals have held that materiality is an element of Section 1014 and that Congress has since amended Section 1014 without explicitly rejecting those decisions. Congress's failure to repudiate those decisions, however, is of no weight when dealing with "language as plain" as found in Section 1014. *Demarest* v. *Manspeaker*, 498 U.S. 184, 190 (1991) ("Where the law is plain, subsequent reenactment does not constitute an adoption of a previous administrative construction."). In addition, the circuits have not uniformly read a materiality requirement into Section 1014; the longstanding view of the Second Circuit is to the contrary. See *United States* v. *Cleary*, 565 F.2d 43, 46 (2d Cir. 1977), cert. denied, 435 U.S. 915 (1978). "This is hardly the sort of uniform construction that Congress might have endorsed." *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517, 531-532 (1994) (rejecting ratification argument where "there was no settled * * * interpretation * * * about which Congress could have been aware"). Nor do any of Congress's amendments to Section 1014, which simply expanded the list of covered financial institutions (see U.S. Br. 19 n.10), support the suggestion that Congress silently embraced a materiality requirement absent from the text of Section 1014.

Finally, respondents argue that the addition of a materiality element would be desirable as a policy matter (Resp. Br. 35-36). That argument ignores the fact that Congress, in defining the elements of the statute, made a judgment, reflected in the statutory

text, as to the appropriate coverage of Section 1014. Respondents rely on cases in which this Court has imputed an intent element to statutes whose text does not refer to the defendant's *mens rea*. See Resp. Br. 26. As we have explained (U.S. Br. 16 n.9), however, in those cases, the Court has taken "particular care * * * to avoid construing a statute to dispense with *mens rea* where doing so would 'criminalize a broad range of apparently innocent conduct.'" *Staples* v. *United States*, 114 S. Ct. 1793, 1799 (1994) (quoting *Liparota* v. *United States*, 471 U.S. 419, 426 (1985)); see also *United States* v. *X-Citement Video, Inc.*, 115 S. Ct. 464, 469 (1994). A defendant who has knowingly made a false statement "for the purpose" of influencing the action of a bank, however, has not engaged in "apparently innocent conduct." *Staples*, 114 S. Ct. at 1799.[2]

From all of the above, it follows that the rule of lenity is inapplicable here. See Resp. Br. 30-31. That rule "applies only when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute." *Shabani*, 115 S. Ct. at 386; *Staples*, 114 S. Ct. at 1804 n.17. That is not the case with respect to Section 1014.

2. Respondents also argue that, even if materiality is not an element of Section 1014, various factors specific to respondents' case required that materiality be treated here as an element and that the judgment must therefore be affirmed. Respondents'

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[2] Nor are respondents assisted by this Court's practice of construing statutes narrowly "to avoid serious constitutional questions" (Resp. Br. 30 n.17). There is no constitutional problem in punishing the knowing making of a false statement for the purpose of influencing a bank, even where there is no showing of materiality.

claims largely reprise arguments made in their brief opposing our petition for a writ of certiorari, and raise claims that were not passed upon by the court of appeals. Because those claims are not encompassed within the question on which certiorari was granted, this Court should not address them.

a. Respondents argue (Resp. Br. 11, 17-20) that the government is precluded from arguing that materiality is not an element of Section 1014 because the government did not initially make that argument in the court of appeals. Rather, as respondents note (Resp. Br. 11), the government first argued that materiality was not an element of Section 1014 after the court of appeals, on June 22, 1995, requested supplemental briefing regarding the effect of this Court's June 19, 1995, decision in *United States* v. *Gaudin*, 115 S. Ct. 2310.

As an initial matter, this Court's traditional rule "precludes a grant of certiorari only when the question presented was not pressed or passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (internal quotation marks omitted). That "rule operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon." *Ibid.*; see also *Stevens* v. *Department of Treasury*, 500 U.S. 1, 8 (1991); *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099 n.8 (1991). That rule is sensible, because when a court of appeals has announced a legal principle of general applicability, it has established governing law for future cases in its jurisdiction. A court's resolution of an issue of law is fairly presented for review, whether or not it was "pressed" by a party. And there can be no doubt that the court of appeals in this case squarely decided the legal issue of whether materiality is an element of Section 1014 in a fashion that will bind courts in all Section 1014 prosecutions in the Eighth Circuit.

In any event, respondents' claim of untimeliness is without merit. Before *Gaudin*, the question whether materiality was an element of Section 1014 was of little practical importance because, under the existing precedent in the Eighth Circuit and almost every other circuit, questions of materiality were decided by the trial judge, not the jury, and district judges routinely found the materiality element to have been established. See, *e.g.*, *United States* v. *Ribaste*, 905 F.2d 1140, 1143 (8th Cir. 1990). The government accordingly did not have occasion or need to contest the holding of the majority of courts of appeals that materiality was an element of the Section 1014 offense.

After respondents were convicted and they appealed, the government again did not have occasion to raise the materiality issue in its initial brief on appeal. Respondents, for their part, did not claim that it was error for the district court to resolve the materiality issue itself. See J.A. 76 ("because of existing law in this circuit, the issue was not briefed" in respondents' opening and reply briefs).[3] Only after the court of appeals directed the parties to brief the effect of *Gaudin* did respondents raise that claim; the government properly replied that there was no error

[3] Respondents' sole argument with regard to materiality in their initial court of appeals brief was that the evidence of materiality was insufficient. The government responded that respondents' false statements regarding their service obligations with customers and regarding their wives' personal loan guarantees were material to the banks' decisions to extend loans to them. The court of appeals agreed that those false statements were material. See Pet. App. 16a-18a.

under *Gaudin*, because materiality is not an element of the Section 1014 offense. Thus, there was nothing untimely about the government's submission. Nor did the court of appeals suggest it was untimely; the court, after receiving the supplemental briefs of the parties, addressed the issue and reversed respondents' convictions based on its holding that materiality is an element of the Section 1014 offense. Pet. App. 10a-14a.

b. Respondents also err in relying (Resp. Br. 12-15) on the fact that the government described respondents' false statements as material in the indictment in this case. The district court is not required to instruct the jury that, to convict, it must find each of the facts alleged in the indictment to have been established beyond a reasonable doubt. Rather, the district court is permitted to delete surplusage not essential to the charge, and "[a] part of the indictment unnecessary to and independent of the allegations of the offense proved may normally be treated as 'a useless averment' that 'may be ignored.'" *United States* v. *Miller*, 471 U.S. 130, 136 (1985), quoting *Ford* v. *United States*, 273 U.S. 593, 602 (1927); see *United States* v. *Adams*, 1 F.3d 1566, 1582 (11th Cir. 1993) (failure to prove quantity of drugs alleged in indictment is not a material variance), certs. denied, 510 U.S. 1198 and 1206 (1994); *United States* v. *Restrepo-Contreras*, 942 F.2d 96, 98 (1st Cir. 1991) (where statute did not require government to establish defendant's specific intent as alleged in the indictment, no proof was required of that intent), cert. denied, 502 U.S. 1066 (1992); *United States* v. *Corpus*, 882 F.2d 546, 553 (1st Cir.) (conviction affirmed where the indictment charged that the defendants possessed a larger quantity of drugs than was shown by the

proof at trial), certs. denied, 493 U.S. 958 (1989), 497 U.S. 1009 (1990); *United States* v. *McMahon*, 861 F.2d 8, 12-13 (1st Cir. 1988) (non-essential allegation in indictment need not be supported by sufficient evidence).[4]

Also unavailing is respondents' related argument (Resp. Br. 15-17) that, even if materiality is not an element of Section 1014, it must be treated as such here, because materiality was mentioned in several jury instructions describing the Section 1014 offense. Respondents rely (Resp. Br. 16-17) on *United States* v. *Jokel*, 969 F.2d 132, 136 (5th Cir. 1992) (per curiam), and other decisions holding that a jury instruction that increases the prosecution's burden of proof and to which the prosecution does not object becomes the "law of the case." The jury instructions in this case, however, did not increase the government's burden of

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[4] *Stirone* v. *United States*, 361 U.S. 212 (1960), on which respondents rely (Resp. Br. 13), is inapposite. In *Stirone*, the trial court improperly added "a new basis for conviction" in its instructions that was different from the basis of the charge set out in the indictment. 361 U.S. at 217. *United States* v. *Staniforth*, 971 F.2d 1355, 1357 (7th Cir. 1992), also relied on by respondents (Resp. Br. 13), similarly observed that it is improper to convict a defendant on a charge not contained within the indictment. The district court here did not commit that error when it did not require the jury to decide whether the false statements were material. As for *United States* v. *Camp*, 541 F.2d 737 (8th Cir. 1976) (Resp. Br. 13), it merely stated the fundamental principle that an indictment must allege all the essential elements of an offense. And in *United States* v. *Nordberg*, 612 F.2d 1 (1st Cir. 1979) (Resp. Br. 14-15), the Section 1014 count of the indictment alleged that false statements were material, and the government conceded that, for purposes of the case, it had to prove materiality. 612 F.2d at 1 n.3. We do not make that concession here.

proof so as to require proof of materiality. Rather, the jury was specifically instructed that it was not to consider whether respondents' false statements were material. See J.A. 43. Indeed, the very basis of the reversal of respondents' convictions was the *absence* of an instruction requiring the jury to find that their false statements had been material.[5]

c. Respondents are also mistaken in claiming (Resp. Br. 17-20) that under the "invited error" doctrine, the government may not assert that materiality is not an element of Section 1014. That doctrine

[5] The decisions on which respondents rely (Resp. Br. 16-17) all involve circumstances where the jury was instructed (without objection) that, to convict, it must find that the government had proved certain facts beyond a reasonable doubt. Those decisions held that an instruction that increases the government's burden and to which the government does not object becomes the "law of the case," even if those facts are not elements of the offense. See, *e.g.*, *United States* v. *Jokel*, 969 F.2d at 136 (instruction increasing the government's burden of proof beyond the statutory elements of 26 U.S.C. 5845(f) to require proof that destructive devices were completed permits a claim on appeal that evidence was insufficient to show that fact); *United States* v. *Killip*, 819 F.2d 1542, 1547-1548 (10th Cir.) (where instruction required proof that defendant personally agreed to commit two predicate crimes to convict him of RICO conspiracy, the conviction would be reversed if the evidence of that agreement was insufficient, regardless whether instruction was correct), certs. denied, 484 U.S. 865 and 987 (1987); *United States* v. *Abod*, 770 F.2d 1293, 1295 n.1 (5th Cir. 1985) (appellate court considers sufficiency of evidence that defendant knew credit card was counterfeit, rather than stolen, whether or not such knowledge was an element of the statutory offense, because instructions had required such proof). Those decisions do not apply where, as here, the jury is not instructed that it must find a fact that increases the government's burden beyond the statutory elements of the offense.

provides that a party "may not complain on appeal" of errors that the party itself invited or encouraged the trial court to commit. See *United States* v. *Sharpe*, 996 F.2d 125, 129 (6th Cir.), cert. denied, 510 U.S. 951 (1993). The government did not "complain on appeal," and does not now claim, that the trial court erred. It is respondents, not the government, who contend that the trial court erred by not submitting the issue of materiality to the jury. The government can defend the district court's judgment on the ground that materiality is not an element of the Section 1014 offense, because an appellate court may affirm a trial court's ruling on any ground apparent from the record. *United States* v. *Alzanki*, 54 F.3d 994, 1008 (1st Cir. 1995), cert. denied, 116 S. Ct. 909 (1996); *United States* v. *Blake*, 941 F.2d 334, 339 (5th Cir. 1991), cert. denied, 506 U.S. 998 (1992); see *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 n.7 (1984).

d. Respondents (Resp. Br. 37-39) and their amici (NACDL Br. 3-14) further claim that, even if materiality is not an element of Section 1014, reversal of their convictions was nonetheless warranted because the district court's instructions mentioning materiality were otherwise defective. Those claims were not raised or passed upon below and do not merit this Court's review. In any event, respondents' claims of instructional error lack merit.

Respondents assert, first (Resp. Br. 38), that the instruction directing the jury not to consider the materiality of the alleged false statements precluded the jury from properly considering the intent element of Section 1014, which requires the government to establish that those false statements were made "for the purpose of influencing" the bank. The district

court, however, merely instructed the jury that the materiality of the statement alleged to be false "is not a matter with which you are concerned and should not be considered by you in determining the guilt or innocence of the defendant." J.A. 43. That instruction did not bar the jury from considering the distinct question whether respondents' false statements had been made for the purpose of influencing the banks' actions—an issue on which the jury was specifically instructed. J.A. 41-42.

Respondents and their amici are also incorrect to claim that, by determining materiality, the district court "essentially took away from the jury the element of 'for the purpose of influencing.'" (Resp. Br. 38; NACDL Br. 4-14). It is true that juries will sometimes look to the materiality or immateriality of a defendant's false statements as a means of determining whether the defendant acted with the purpose of influencing the bank. As respondents acknowledge (Resp. Br. 38), however, the issues of intent and materiality are analytically distinct, and it is possible to establish by other means (including through testimony of confederates or statements of the defendant) that a defendant acted with the purpose of influencing the bank.[6] Moreover, because the district court in this case did not tell the jury that it had already found

[6] Respondents are wrong to claim that "[t]he Government states that if statements are made for the purpose of influencing actions of a covered institution, the statements must be material because immaterial statements would not influence the banks." Resp. Br. 37 (citing U.S. Br. 20-22). Rather, our view is that, while offenses prosecuted under Section 1014 often will involve materially false statements, Section 1014 also applies to immaterial false statements, provided that the other elements of the offense are established.

respondents' false statements to be material, there was no possibility that the court's finding influenced the jury's determination on the intent element.

Finally, respondents claim (Resp. Br. 38-39) that the district court erred in instructing the jury that "[a] statement or representation is 'false' when it is untrue when made or effectively conceals a material fact. A material fact is a fact that would be important to a reasonable person in deciding whether to engage or not to engage in a particular transaction." J.A. 42.[7] It is unlikely that the reference to materiality in that definition had any impact upon the jury's consideration of the falsity of the statements at issue, in light of the court's ensuing instruction not to consider the materiality of the charged statements. J.A. 43. The instruction did not deprive the jury of its responsibility to determine whether respondents' statements were, in fact, false.

[7] Respondents contend in passing (Resp. Br. 25 n.12) that, because Section 1014 punishes false statements but does not refer to "omitted information," their failure to disclose their service agreements when they applied for bank financing did not violate the statute. The court of appeals correctly rejected that argument (see Pet. App. 14a-16a). A loan application that selectively omits responsive information regarding potential liabilities constitutes a "false statement" within the meaning of Section 1014. See Pet. App. 15a (citing cases).

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

SEPTEMBER 1996